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SUPREME COURT, U.S.

No. 75-6657

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

ANGELO BARTEMIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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Petitioner contends that the court of appeals erred in dismissing, for lack of jurisdiction, his pretrial appeal from the denial by the district court of his double jeopardy claim.

On May 1, 1973, petitioner was convicted after a jury trial in United States District Court for the Northern District of Illinois of aiding and abetting the unlawful possession and transfer of stolen securities, in violation of 18 U.S.C. 659. He was sentenced to five years' imprisonment. The court of appeals affirmed (497 F.2d 927), and this Court denied certiorari (419 U.S. 994).

Petitioner moved under 28 U.S.C. 2255 for a new trial, contending that the government had unlawfully concealed evidence favorable to him. The district court denied relief. On appeal the government confessed error, and the court of appeals reversed (513 F.2d 634). On remand petitioner moved to dismiss the indictment. He contended that a second trial

would violate the Double Jeopardy Clause. The district court denied his motion, and petitioner appealed. The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. A).

On June 14, 1976, this Court granted certiorari in Abney v. United States, No. 75-6521, which presents the question whether the pretrial denial of a double jeopardy claim is immediately appealable. There is no reason, however, for the Court to hold this case pending disposition of Abney. Petitioner's double jeopardy argument is not even colorable. The Double Jeopardy Clause does not bar the retrial of a defendant whose conviction is set aside at his behest. United States v. Tateo, 377 U.S. 463; Forman v. United States, 361 U.S. 416, 425-426. Petitioner's conviction was set aside, by the court of appeals, at his behest. His speculation that the first trial might have ended in acquittal if it had been error-free is accordingly beside the point. Petitioner's appeal could have been dismissed as frivolous. We submit, therefore, that the Court should deny the petition in order to prevent further delay in holding petitioner's second trial for events that occurred in 1971. If petitioner should be convicted once more, he will have an opportunity to present all of his arguments, including the double jeopardy argument, to the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1976.